INDEX

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1973

No.

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR, ET AL., APPELLANTS

v.

C. R. MANCARI, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

JURISDICTIONAL STATEMENT

OPINION BELOW

The memorandum opinion of the three-judge district court (App. A, *infra*) is not yet reported.

JURISDICTION

Appellees brought this action in the United States District Court for the District of New Mexico seeking to enjoin the enforcement of 25 U.S.C. 44, 46 and 472, the Indian Preference Laws, as violative of

the Fifth Amendment of the Constitution and as contrary to Section 717 of the Equal Employment Opportunity Act of 1972, 42 U.S.C. (Supp. II) 2000e-16. Since the constitutional claim was not insubstantial a three-judge district court was properly convened. 28 U.S.C. 2282. On June 1, 1973, the three judge district court entered a judgment (App. B, *infra*) enjoining enforcement of the Indian Preference Laws as inconsistent with the Equal Employment Opportunity Act. The government filed a notice of appeal on June 29, 1973 (App. C, *infra*). On August 16, 1973, Mr. Justice Marshall stayed the injunction pending final determination by this Court (App. D, *infra*).

The jurisdiction of this Court is conferred by 28 U.S.C. 1253; *Zemel* v. *Rusk*, 381 U.S. 1, 5-7.

QUESTION PRESENTED

Whether the Equal Employment Opportunity Act of 1972 repealed, by implication, the Acts of Congress giving Indians preference in employment in the Bureau of Indian Affairs of the Department of the Interior.

STATUTES INVOLVED

Section 10 of the Act of August 15, 1894, 28 Stat. 313, 25 U.S.C. 44, provides:

> That in the Indian Service Indians shall be employed as herders, teamsters, and laborers, and where practicable in all other employments in connection with the agencies and the Indian Service. And it shall be the duty of the Secre-

tary of the Interior and the Commissioner of Indian Affairs to enforce this provision.

Section 6 of the Act of May 17, 1882, 22 Stat. 88, 25 U.S.C. 46, as re-enacted July 4, 1884, 23 Stat. 97, provides in relevant part: [1]

> Preference shall at all times, as far as practicable, be given to Indians in the employment of clerical, mechanical, and other help on reservations and about agencies.

Section 12 of the Act of June 18, 1934, 48 Stat. 986, 25 U.S.C. 472, provides:

> The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil service laws, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions.

Section 717 of the Equal Employment Opportunity Act of 1972, 86 Stat. 111, 42 U.S.C. (Supp. II) 2000e-16, provides in relevant part as follows:

> (a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as de-

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[1] These are sections of appropriation acts for individual years, and may have expired with their fiscal years.

fined in section 102 of title 5, United States Code, in executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from non-appropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

STATEMENT

The appellees are non-Indian employees of the Bureau of Indian Affairs holding teaching or other positions in the federal Indian Service who complain that they were denied promotion because Indians were accorded preference for the jobs they were seeking. They brought this action on their own behalf and for the class of similarly-situated non-Indians to enjoin the Secretary of the Interior and certain named officials of the Bureau of Indian Affairs from enforcing the Indian Preference Laws.

The appellees argued that the preference laws are unconstitutional in that they deprive non-Indian employees of the Bureau of Indian Affairs of property without due process of law in violation of the Fifth Amendment; that they have been repealed by the

Equal Employment Opportunity Act of 1972; and that, in any event, they are being interpreted too broadly by the Secretary in that the laws were intended to apply only to initial hirings, not promotions (App. A, *infra*, pp. 13-14). In a memorandum opinion (App. A, *infra*) the court held that the Indian Preference laws had been tacitly repealed by the Equal Employment law. While suggesting that it could do so, the court expressly did not hold the laws unconstitutional (App. A, *infra*, p. 23).[2] The court's judgment "permanently enjoin[s] [the appellants] from implementing any policy in the Bureau of Indian Affairs which would hire, promote, or reassign any person in preference to another solely for the reason that such person is an Indian * * *." (App. B, *infra*). On August 16, 1973, Mr. Justice Marshall stayed the mandate of the district court. The government now appeals the decision of the district court to this Court under 28 U.S.C. 1253.

THE QUESTION IS SUBSTANTIAL

1. The preference for Indians in the Indian Service, which existed in a fragmentary form in treaties and appropriation acts for many years, was made a general policy by Congress as part of the Indian Reorganization Act of 1934, 48 Stat. 986, 25 U.S.C. 472. See United States Department of the Interior,

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[2] In light of its holding that the preference laws had been repealed, the court did not comment on the scope of their enforcement.

Federal Indian Law, p. 532 *et seq.* (1958). It was designed to return to Tribal Indians a measure of control over their own affairs and to increase opportunities for Indian employment.[8] The preference, in

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[8] The co-sponsors of the bill spoke in plain words of the need for these laws (Senator Wheeler, 78 Cong. Rec. 11,123):

> The bill also has a provision to open the way for qualified Indians to hold positions in the Federal Indian Service on the Indian reservations. At the present time, by reason of the civil service rules and regulations, we find that competent Indians are absolutely unable to take or hold positions in the Indian Service. * * *
>
> * * * the rules and regulations of the Bureau of Indian Affairs and the civil service have been such that it has been necessary to employ white men to do the Indian work when there were Indians who were thoroughly competent to carry on their own business.
>
> As an illustration of that let me call attention to the fact that the Indians on the Klamath Reservation, as well as on the White River Reservation and other reservations, have grown up in the timber business; and notwithstanding the fact that they knew the timber business probably as well as any white man, yet because of the fact that they have had no college education they were not permitted to be employed even as scalers of their own timber. The result has been that the Indians have been given no opportunity to handle their own affairs or to be trained in their own affairs. This bill, we think, gives them the opportunity to which they are entitled.

Representative Howard was equally to the point (78 Cong. Rec. 11,731):

> I have already spoken of the difficulty which Indians experience in meeting the civil service requirements for entering the Indian Service. It should be possible for Indians to enter the service of their own people without running the gauntlet of competition with whites for these positions. Indian progress and ambition will be enormously strengthened as soon as we adopt the prin-

practice, provides jobs for Tribal Indians and, equally important, ensures that the government's relations with the Tribes, at the level of the Bureau of Indian Affairs in Washington and in the field, will be informed by the special sensitivity which those who belong to the beneficiary-minority can bring to the federal Indian program.

The effect of the preference laws involving Tribal Indians in the Indian Service is dramatic. In 1934, there were approximately 2,100 Indians employed by BIA out of about 6,500 employees, or about 34% (Tr. 84).[4] By 1972, under the operation of the statute, the number had grown to 57% of a total employment of approximately 16,500 (Tr. 85). Until recently, the government applied the preference only to initial hiring in the Indian Service, not to promotions (Tr. 80-82). With present, more vigorous application of the laws (which apparently precipitated this suit, see *e.g.*, Tr. 7-8), considerable progress has been made in giving Indians the opportunity to make the decisions and to do the work needed for their own betterment. Removing the preference given Indians in the Indian Service would seriously undermine this important congressional policy.

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ciple that the Indian Service shall gradually become, in fact as well as in name, an Indian service, predominantly in the hands of educated and competent Indians.

[4] "Tr." refers to the transcript of the trial held November 29, 1972, which we are lodging with the Clerk. The references above and which follow are to the testimony of Raymond Gunter, Chief Personnel Officer of the Bureau of Indian Affairs.

2. The district court erroneously held that the enactment of Section 717 of the Equal Employment Opportunity Act of 1972, 42 U.S.C. 2000e-16, repealed the Indian preference laws. Nothing in the Equal Employment Act or its legislative history indicates an intention to repeal the specific and long-standing legislation giving Indians a preference in the Indian service. Nor would one expect that result. The legislative policy in both cases was really the same: to protect minority employment. Indeed, the 1972 law was an amendment to the Civil Rights Act of 1964, 42 U.S.C. 2000a *et seq.*, which specifically exempts Indian Tribes from the definition of "employer," 42 U.S.C. 2000e, and provides that businesses or enterprises located near Indian reservations can give preferential treatment to Indians, 42 U.S.C. 2000e-2(i) (Section 703(i) of the Act). According to its sponsor, Senator Humphrey, "[t]his exemption is *consistent* with the Federal Government's policy of encouraging Indian employment and with the special legal position of Indians." 110 Cong. Rec. 12,723. There is no reason to believe that, in passing the 1972 Act amending the 1964 legislation—without any debate on or specific reference to the subject—Congress intended to abolish the preference given to Indians for employment in the Indian service, particularly on reservations, while preserving Indian preferences in private employment near reservations and in tribal employment.[6]

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[6] See, also, 20 U.S.C. (Supp. II) 887c(d), 86 Stat. 340, enacted June 23, 1972, two months after the Equal Employment

To the contrary, this is a classic case for applying the settled canon of statutory construction that repeals by implication are not favored and should be avoided where possible. *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 549; *United States* v. *Borden Co.*, 308 U.S. 188, 198. The controlling rule here is that, in the absence of strong indications, special statutes (such as the Indian Preference statutes) are not impliedly repealed by a general statute (such as the Equal Employment Opportunity Act), but, rather, survive as exceptions to the new law. *Rodgers* v. *United States*, 185 U.S. 83, 87-88; *Ex Parte Crow Dog*, 109 U.S. 556, 570; *Bulova Watch Company* v. *United States*, 365 U.S. 753, 758. There was no shift in governmental policy with respect to Tribal Indians between 1964 and 1972, nor any other evidence, that would justify the inference that, in the latter year, Congress meant to reverse direction and repudiate the settled practice, re-confirmed in 1964, of recognizing a preference for Indians in limited areas of special concern to them.* But, if there be any doubt on this score, the legislation must be construed most favorably to the Indians. See *Squire* v. *Capoe-*

Act, in which Congress provided a preference for Indians to receive grants in programs designed to prepare persons to serve Indian children "as teachers, teachers aides, social workers, and ancillary educational personnel."

* Moreover, the Equal Employment Act is essentially a civil service law concerning federal employment, and 25 U.S.C. 472 expressly provides for an exemption from civil service laws for employment of Indians in the Indian Service.

man, 351 U.S. 1, 6-7; *Menominee Tribe* v. *United States*, 391 U.S. 404.

3. The Indian Preference Laws are not unconstitutional. We stress that the benefit of the preference extends only to Indians who are members of Tribes recognized by the Department of the Interior and whose affairs are administered by the Bureau of Indian Affairs (Tr. 90, 99). Accordingly, we are not confronted with strictly racial legislation. At all events, it is well settled that Congress enjoys plenary power to make laws for the protection of Tribal Indians. Far from offending constitutional principles, that doctrine has its roots in the Indian Commerce Clause of the Constitution (Article I, Section 8, Cl. 3), which recognizes Indian Tribes as separate "nations", dependent on the United States. See *McClanahan* v. *Arizona State Tax Commission*, No. 71-834, decided March 27, 1973, slip op., pp. 4-10, especially p. 8, note 7; *Board of County Commissioners* v. *Seber*, 318 U.S. 705, 715. The unique history of our relations with the Indian Tribes, recognized by the Constitution and continuing to the present day, permits special arrangements that would not be appropriate with respect to other groups. Accordingly, nothing in the Fifth Amendment prohibits Congress from making special laws affecting Indians, and conferring upon them advantages not enjoyed by the population at large. See *McClanahan*, *supra*; *Mescalero Apache Tribe* v. *Jones*, No. 71-738, decided March 27, 1973, slip op., pp. 13-14.

The Bureau of Indian Affairs is unusual in that

it serves only one ethnic group (Tr. 93), albeit not all members of that minority. Such Indians do not receive a preference in other branches of government (other than the Indian Health Service which has been transferred from the BIA to the Department of Health, Education and Welfare) (Tr. 94-95). The preference is a rational attempt by Congress to meet a special and long standing social problem by encouraging renewed participation in their own affairs by a people who had previously been subjected by the federal government itself to a role of dependence. There is no reason, by invoking novel constitutional doctrine or strained statutory construction, to reverse that policy today.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

WALLACE H. JOHNSON,
Assistant Attorney General.

CARL STRASS,
EVA R. DATZ,
Attorneys.

AUGUST 1973.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

No. 9626 Civil.

C. R. MANCARI, ANTHONY FRANCO, WILBERT GARRETT and JULES COOPER, on behalf of themselves and all others similarly situated, PLAINTIFFS

v.

ROGERS C. B. MORTON, as Secretary of the Interior, *et al.*, DEFENDANTS

MEMORANDUM OPINION

Filed at Albuquerque, June 1, 1973

This is a class action brought by the named plaintiffs on behalf of themselves and all other employees of the Bureau of Indian Affairs who are of less than twenty-five per cent Indian blood. Plaintiffs seek to enjoin the defendants from implementing and enforcing a policy of the Bureau of Indian Affairs to give preference to persons of one-quarter or more Indian blood in initial hiring, training, promotion, and reinstatement.

Plaintiffs allege that Title 25, United States Code, §§ 44-46 and 472 (hereinafter the Indian Preference Statutes), are being improperly construed by the Secretary and the Commissioner in that these sections were meant to extend a preference to Indians in initial hiring only. Plaintiffs further allege that this expanded policy violates their rights under the Civil Rights Acts of 1964 and 1972, which rights are

guaranteed them in Title 42, United States Code, §§ 2000e et seq., and Public Law 92-261, § 717. Finally plaintiffs allege that the Indian Preference Statutes are unconstitutional because they deprive plaintiffs of their rights to property without due process of law in violation of the Fifth Amendment to the United States Constitution.

The non-Indian plaintiffs are longtime employees of the BIA. They are teachers at the Albuquerque Polytechnic Institute, or programmers, or in computer work, or teachers in other areas. They testified as to particular training or advancements for which they had applied, and which in their opinion were denied by reason of the application of the preference policy. We find that the plaintiffs demonstrated sufficient connection with the application of the policy to bring this action for themselves and others similarly situated.

The defendants are persons occupying official positions relating to the BIA and are responsible for the application of the Acts herein concerned.

We find that there are asserted substantial constitutional questions requiring consideration by a three-judge court

The United States Attorney, who appears for the defendants, challenges the court's jurisdiction over the subject matter. The Court of Appeals in Mescalero Apache Tribe v. Hickel, 432 F.2d 956 (10th Cir.), held that there was jurisdiction under 5 U.S.C. § 704 in that action. Here the plaintiffs assert jurisdiction under 42 U.S.C. § 2000e and 28 U.S.C. § 1346(a)(2). This could be considered under the latter statute since the action was against "Rogers C. B. Morton, as Secretary of the Interior," and against other named persons in their official capacities. As indicated, the United States Attorney has

appeared as counsel for the defendants. However, we hold that there is jurisdiction under 42 U.S.C. § 2000 e, and any further challenge before the Department concerned would be an idle gesture in the face of the issuance of the policy statement and its implementation by regulations and orders. The issue is not an interpretation of policy statements or their application, but is a direct challenge to the validity of the statute on which the departmental policy is based. There is thus no purpose shown why any further administrative action would serve any useful purpose. Mescalero Apache Tribe v. Hickel, 432 F.2d 956 (10th Cir.), we believe, is significant on this point although it dealt with 5 U.S.C. § 704 where no administrative machinery was expressly provided.

Defendants contend that they are directed by 25 U.S.C. § 472 to implement the policy of Indian preference. Section 472 provides as follows:

> "The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions."

Other statutory provisions relating to preference, although less explicit, appear at 25 U.S.C. §§ 44 and 46.

The gist of the preference policy which precipitated the challenge was embodied in Personnel Management Letter No. 72-12, issued by the Albuquerque Area Office of the BIA, which provided in part as follows:

"The Secretary of the Interior announced today he has approved the Bureau's policy to extend Indian preference to training and filling vacancies by original appointment, reinstatement and promotions. . . .

"The new policy provides as follows: Where two or more candidates who meet the established requirements are available for filling a vacancy, if one of them is an Indian, he shall be given preference in filling the vacancy. This policy is effective immediately, and is incorporated into all existing programs such as the Promotion Program. . . ."

The policy was officially announced and, as we find from the evidence that it is being carried out, applies the preference in hiring and promotions. Instances of promotional preferences were testified to by the witnesses. The policy is thus a reality, and far beyond the formative stage.

A preliminary issue relates to the validity of 25 U.S.C. § 472, quoted above, in view of its inclusion in the heterogeneous Indian Reorganization Act of 1934. This provision was included in the Reorganization Act together with other sections which relate to a variety of subjects. In one of the sections, now 25 U.S.C. § 478, provision is made for submission of "the Act" for acceptance or rejection by the various Indian tribes. This voting section (478) on its face would appear to make the application of section 472, with which we are here concerned, optional with individual tribes by requiring a special election of the adult members of the tribe to vote on the application of the entire Act.

The Reorganization Act was submitted and voted on and was rejected by a considerable number of

tribes. This rejection and acceptance tribe by tribe creates some uncertainty, but a careful reading of the other sections, as well as a review of the Congressional history of the Act, convinces us that the elections were to be only for the purpose of accepting or rejecting sections 476 and 477 of Title 25, 48 Stat. 987-88. For example, we cannot believe that Congress intended all the Indian tribes to vote on the extension of boundaries of the Papago Reservation (section 463a, 50 Stat. 536), on the Secretary making rules and regulations for the operation and management of Indian forestry units (section 466, 48 Stat. 986), or on appropriations for vocational and trade schools (section 471, 48 Stat. 985), or on other provisions found in the Indian Reorganization Act. It is difficult to see how under any other construction the Act would be valid.

Senator Wheeler, one of the sponsors of the Reorganization Act, made the following remarks in his discussion of sections 476 and 477 of the Act:

> "The third purpose of the bill is to stabilize the tribal organization of Indian tribes by vesting such tribal organizations with real, though limited, authority, and by prescribing conditions which must be met by such tribal organizations. This provision will apply only if a majority of the Indians on any Indian reservation desire this sort of organization. As a matter of fact, however, it does not change to any great extent the present tribal organization, except that when a majority of the Indians want to establish this tribal organization and extend the provisions of the bill to it, they may do so." (1934 Congressional Record, p. 11123).

Nothing which followed in the debate or in the way of amendments suggests to us that the option of acceptance was extended to any other portion of the Act, and therefore the preference section here concerned must be held to extend to all Indians as individuals.

The issue of the proper construction of 25 U.S.C. § 472 is urged on this appeal and is a significant problem. The United States Court of Appeals for the Tenth Circuit in Mescalero Apache Tribe v. Hickel, 432 F.2d 956, considered the application of the preference statutes to reductions in the work force of the Bureau of Indian Affairs, and held the preference not applicable. There section 472 was considered, as were sections 44 and 46 of 25 U.S.C., and references were made to the legislative history. The parties and the court were there concerned only with the particular issue at hand. There was no other issue nor a general challenge to the Act. The preference thus does not apply to reductions in the work force.

The United States District Court for the District of Columbia, in Freeman v. Morton, Civ. No. 327-71 (not yet reported), had before it the question of whether or not section 472 gave the plaintiff a preference over all non-Indian employees in the Bureau of Indian Affairs with respect to promotions, reassignments to vacant positions within the BIA, and to assignments to available training positions (the contrary position was that the preference was only as to initial hiring). The district court in Freeman held that section 472 required the preference be given in promotions and reassignments to vacant positions within the Bureau, but that it did not extend to positions in training programs.

We do not decide whether the preference is as broad as the court in Freeman v. Morton indicates. It is sufficient to permit consideration of the basic issue to observe that no one challenges the application of the preference acts to initial hiring and indeed the wording does not permit such a challenge.

We turn now to the asserted conflict between the Indian Preference statute and the Civil Rights Acts of 1964 and 1972 (Equal Employment Opportunity Act, 1972, Public Law 92-261). As indicated above plaintiffs assert that the Indian Preference Policy adopted and implemented by the Bureau is in direct conflict with the Civil Rights Act of 1964 and 1972, and more specifically with Title 42, United States Code, § 2000e-2 and as amended by Public Law 92-261. Plaintiffs in their challenge to the preference acts thus assert that the Bureau, by refusing to obey the Congressional mandate set forth in section 717 of Public Law 92-261, is violating the rights given them under that added section.

Section 717 provides in part as follows:

> "Sec. 717. (a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code, in executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units

> of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin."

On its face, section 717 applies to all agencies of the federal government. There is nothing in the Committee Report or in House Report No. 92-238, accompanying H. R. 1746, enacted into law as Public Law 92-261, which would indicate that the Bureau of Indian Affairs be excepted from its provisions (see 1972 U.S. Code Cong. & Ad. News, pp. 2137, 2157). Exceptions are contained in the Act, but none as to the Indians or the Bureau.

Senator Byrd of West Virginia, speaking in favor of the bill, made the following remarks:

> "I do not favor special treatment or special consideration or favored employment of any individual on the basis of that person's being black or white, male or female. . . Notwithstanding what I have just said, the fact remains that discrimination in employment, on the basis of race, does exist, and discrimination against sex does persist. Wherever there is such discrimination in employment, it is violative of the Constitution of the United States. . . .
>
> "In other words, he should rise or fall on the basis of merit, not on the basis of race or religion or sex. Every qualified individual—black, white or else—should be given an equal chance—not preferential treatment—at employment." (Congressional Record, January 26, 1972, at s. 590).

And Senator Humphrey, speaking for the bill, made the following statement:

> "We must make absolutely clear the obligation of the Federal Government to make all personnel actions free from discrimination based on race, color, sex, religion, or national origin." (Congressional Record, January 20, 1972, at ss. 172-173).

The United States Supreme Court, in Griggs v. Duke Power Co., 401 U.S. 424, at 430-31, held as to Title VII:

> "Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."

The Eighth Circuit has also held that Title VII forbids reverse discrimination. Carter v. Gallagher, 452 F.2d 315 (8th Cir.). See also Jackson v. Poston, No. 18296, New York Sup. Ct.

Should section 717 of Public Law 92-261 take precedence over the Indian Preference Statutes? Although we are reluctant to hold that Congress has overridden by subsequent legislation long existing statutes without specific reference to them, we must conclude that this was done in this instance.

The Equal Employment Opportunity Act of 1972 is a clear, emphatic directive by Congress that all positions in the competitive civil service of the federal government should be filled without regard to race, religion, sex, color, or national origin. It is subject to no other interpretation, and as indicated, there were exceptions placed in it, so Congress considered limitations on its scope, but none was included as to the Bureau of Indian Affairs. Thus the several preference statutes were overridden, and the Bureau must conform to the broad sweep of section 717.

This is not a simple instance of a relationship of a general statute to a special subject statute which often occurs. Each statute purports to cover the same particular subject of personnel actions relating to, as section 717 described them, ". . . discrimination based on race, color, religion, sex, or national origin." One Act applies to all but some excepted bureaus or agencies and the other to the "Indian Office." This is not a sufficient difference in the scope to bring into consideration the doctrine relating to conflicts between special and general statutes. Further by the nature of the subject matter and scope, the two cannot exist side by side. See Posadas v. National City Bank, 296 U.S. 497.

There was no evidence introduced to show in any way that having seventy-five per cent non-Indian blood and twenty-five per cent Indian blood was in any way a job-related criterion. Griggs v. Duke Power Co., 401 U.S. 424. There was no evidence whatever presented to show any national-public purpose concerned in the preference policy as compared with the nondiscrimination statutes. There would certainly have to be some showing of these factors before defendants' arguments could be considered to support the preference statutes as an exception.

We do not consider that Board of County Comm'rs v. Seber, 318 U.S. 705, or Simmons v. Eagle Seelatsee, 384 U.S. 209, led to a contrary conclusion. It is apparent that Indian tribes have been the subject of particular legislation from time to time. But this of itself is no reason for a different treatment of Indians generally. Indians as such are not considered to have rights, so far as here pertinent, different from other citizens; they are citizens and are obviously entitled to all rights, privileges, and burdens thereof.

We have not considered the challenge by plaintiffs to the constitutionality of the preference statutes. This issue involves the consideration of the reasonable governmental purpose or objective sought to be attained in creating the preferred position for certain persons having a stated percentage of Indian blood as compared to others. There was testimony as to the manner in which certain non-Indians were affected by the policy. The separate treatment was thereby established together with its impact on the individuals. The defendants had the burden of coming forward with evidence of an important governmental objective but put on no evidence directed to this matter. Under these circumstances, we could well hold that the statute must fail on constitutional grounds, but instead we hold as above described that the preference statutes must give way to the Civil Rights Acts.

/s/ Oliver Seth
United States Circuit Judge

/s/ Howard Bratton
United States District Judge

/s/ E. L. Mechem
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

No. 9626 Civil

C. R. MANCARI, *et al.*, PLAINTIFFS

v.

ROGERS C. B. MORTON,
Secretary of the Interior, *et al.*

[Filed at Albuquerque, Jun. 1, 1973]

JUDGMENT

IT IS ORDERED, ADJUDGED AND DECREED that the named defendants are hereby permanently enjoined from implementing any policy in the Bureau of Indian Affairs which would hire, promote, or reassign any person in preference to another solely for the reason that such person is an Indian, since 25 U.S.C. §§ 44, 46 and 472 are contrary to the Civil Rights Act, and are inoperative.

IT IS SO ORDERED.

/s/ Oliver Seth
United States Circuit Judge

/s/ Howard Bratton
United States District Judge

/s/ E. L. Meechem
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

No. 9626 Civil

C. R. MANCARI, *et al.*, PLAINTIFFS

—*vs*—

ROGERS C. B. MORTON,
Secretary of the Interior, *et al.*

[Original Filed Jun. 29, 1973]

NOTICE OF APPEAL

NOTICE is hereby given that the defendants Rogers C. B. Morton, as Secretary of the Interior, Louis R. Bruce, as Commissioner of Indian Affairs, Walter O. Olson, as Area Director, Bureau of Indian Affairs, Albuquerque Area Office, and Anthony Lincoln, as Area Director, Bureau of Indian Affairs, Navajo Area Office, hereby appeal to the Supreme Court of the United States from the final judgment entered in this action on June 1, 1973. This appeal is taken pursuant to the provisions of 28 U.S.C., Section 1253.

/s/ Victor R. Ortega
VICTOR R. ORTEGA
United States Attorney
Post Office Box 607
Albuquerque, New Mexico 87102
Attorney for Defendants

PROOF OF SERVICE

I hereby certify that I mailed a true copy of the foregoing Notice of Appeal by depositing the same in a United States Post Office, first class mail, to counsel for defendants, John M. Kulikowski, Post Office Drawer 1126, Albuquerque, New Mexico 87103, and to counsel for Intervenor, Harris D. Sherman, 1130 Capitol Life Center, Denver, Colorado 80203, this 29th day of June, 1973.

/s/ Victor R. Ortega
VICTOR R. ORTEGA
United States Attorney

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. A-188

ROGERS C. B. MORTON, Secretary of the Interior, *et al.*, PETITIONERS

v.

C. R. MANCARI, *et al.*

ORDER

UPON CONSIDERATION of the application of counsel for the appellants and the response filed thereto,

IT IS ORDERED that the execution and enforcement of the judgment of the United States District Court for the District of New Mexico in Case No. 9626 Civil be, and the same is hereby, stayed pending the timely docketing of an appeal in the above-entitled cause. Should such an appeal be so timely docketed, this order is to continue pending this Court's action on the jurisdictional statement. If the appeal is dismissed or the judgment of the United States District Court for the District of New Mexico affirmed, this order is to terminate automatically. In the event that jurisdiction is noted or postponed, this order is to remain in effect pending the sending down of the judgment of this Court.

/s/ Thurgood Marshall
Associate Justice of
the Supreme Court
of the United States

Dated this 16th of August 1973.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1973 515914 77

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-364

ROGERS C. B. MORTON,
Secretary of the Interior, *et al.*,
Appellants,

—and—

AMERIND,
Intervenor-Appellant,

—v.—

C. R. MANCARI, *et al.*,
Appellees.

JURISDICTIONAL STATEMENT ON BEHALF OF INTERVENOR-APPELLANT AMERIND

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Dated: January 29, 1974

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Introduction—Noting of Probable Jurisdiction in Government's Appeal from Same Judgment

This action was brought in the United States District Court for the District of New Mexico, by four non-Indian employees of the Bureau of Indian Affairs (the "Bureau") challenging the validity of the so-called Indian Preference Statutes, which *inter alia* require the Bureau to give preference to Indians in "appointment[s] to vacancies" within the Bureau. On November 20, 1972, the District Court granted the motion of Intervenor-Appellant Amerind, a nonprofit organization representing Indian employees of the Bureau of Indian Affairs, to intervene as a party in the proceeding (Appendix A), which motion specifically asserted that the Government was unable adequately to

represent the interests of the Bureau's Indian employees. Following a hearing in which Intervenor-Appellant Amerind actively participated, a three-judge panel of the District Court entered judgment on behalf of Plaintiffs. (Appendix B)

On August 28, 1973, Intervenor-Appellant Amerind filed a Jurisdictional Statement with this Court in typewritten form, together with a Motion to Dispense with Printing of the Jurisdictional Statement. On the same day, the Government filed its Jurisdictional Statement on appeal from the same judgment, *Rogers C. B. Morton, et al.* v. *C. R. Mancari, et al.*, No. 73-362.

On January 14, 1974, the Court entered an Order noting probable jurisdiction in the Government's appeal. On the same day the Court entered an Order in this appeal denying the Motion to Dispense with Printing the Jurisdictional Statement, with leave to file a printed appeal on or before January 29, 1974. This Jurisdictional Statement is being submitted in accordance with that Order.

At the outset, we respectfully urge the Court to take the actions necessary to permit Amerind to present its own views to the Court in this case at the same time as the Government presents its appeal. The two appeals are from the same judgment. Moreover, while the Government and Amerind both contend that the Indian Preference Statutes are valid, there remain substantial differences between them as to the precise scope, operation and purpose of those statutes. Indeed, as noted, this was the ground on which Amerind's intervention below was based.* In view

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* We refer this Court to the case of *Freeman* v. *Morton*, —— F.Supp. —— (D.D.C. 1972), described in detail at pp. 10-11 of this Statement, in which a number of Indian employees of the Bureau brought suit against the Government challenging the Bureau's narrow application of Indian Preference.

of the substantial disagreement between the Indian employees of the Bureau and the Bureau itself as to the precise extent of Indian Preference, we submit that it is essential for representatives of those Indian employees to be permitted to participate in the appeal from the judgment below. Furthermore, since probable jurisdiction has already been noted in the Government's appeal, we respectfully urge this Court to expedite consideration of this Jurisdictional Statement.*

Opinion Below

The opinion and judgment of the three-judge District Court for the District of New Mexico held that 25 U.S.C. §§ 44, 45, 46 and 472, known as the Indian Preference Statutes, had been impliedly repealed by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-2, and enjoined the defendants from implementing such statutes. Copies of the opinion and judgment of the District Court, which have not been reported, are attached to this Statement as Appendix B.

Jurisdiction

Plaintiffs, four non-Indian employees of the Bureau of Indian Affairs ("the Bureau") brought this action on behalf of themselves and of all other non-Indian employees

* Appellees have already responded to the issues raised in this Jurisdictional Statement, in their Motion to Dismiss Appeal and to Affirm the Decision of the Lower Court, dated December 14th, 1973, responding to both the Government's appeal and Amerind's typewritten appeal. The only difference between Amerind's typewritten appeal and this document are the addition of this introduction and the addition of the second footnote on page 8.

of the Bureau, seeking to enjoin the defendants, the Secretary of the Interior and certain officials of the Bureau ("the Government"), from implementing and enforcing a policy of the Bureau giving preference to qualified Indians in initial hiring, training, promotion, and reinstatement. Plaintiffs alleged that the statutes under which this policy was implemented, 25 U.S.C. §§ 44, 45, 46 and 472, were unconstitutional, or, alternatively, that they had been impliedly repealed by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-2. Plaintiffs invoked jurisdiction under 28 U.S.C. § 1346(a)(2). Intervenor-Appellant Amerind, a nonprofit organization representing Indian employees of the Bureau, was permitted to intervene as a party defendant in the case by order of the District Court dated November 20, 1972.

The judgment of the District Court was entered on June 1, 1973. Notices of Appeal were filed by the Government and by Amerind on June 29, 1973. (Appendix C)

Jurisdiction over this appeal is conferred upon this Court by 28 U.S.C. § 1253. Plaintiffs sought an injunction restraining enforcement of the Indian Preference Statutes in part upon constitutional grounds, and the case was therefore required by 28 U.S.C. § 2282 to be heard and determined by a three-judge district court. In these circumstances this Court has jurisdiction to hear the appeal under § 1253, notwithstanding the fact that the District Court did not directly rule upon the constitutional issue. *See, e.g., Flast* v. *Cohen,* 392 U.S. 83, 90-91 (1968); *Zemel* v. *Rusk,* 381 U.S. 1, 5-6 (1965); *Brotherhood of Locomotive Engineers, et al.* v. *Chicago Rock Island and Pacific Railroad Co., et al.,* 382 U.S. 423, 428 (1966); *Florida Lime Growers* v. *Jacobsen,* 362 U.S. 73, 84-85 (1960).

Statutes Involved

The Indian Preference Statutes provide as follows:

(1) 25 U.S.C. § 44, 28 Stat. 313 (1874):

> In the Indian Service Indians shall be employed as herders, teamsters, and laborers, and where practicable in all other employments in connection with the agencies and the Indian Service. And it shall be the duty of the Secretary of the Interior and the Commissioner of Indian Affairs to enforce this provision.

(2) 25 U.S.C. § 45, 4 Stat. 737 (1834):

> In all cases of the appointments of interpreters or other persons employed for the benefit of the Indians, a preference shall be given to persons of Indian descent, if such can be found, who are properly qualified for the execution of the duties.

(3) 25 U.S.C. § 46, 22 Stat. 88 (1884):

> Preference shall at all times, as far as practicable, be given to Indians in the employment of clerical, mechanical, and other help on reservations and about agencies.

(4) 25 U.S.C. § 472, 48 Stat. 986 (1934):

> The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions.

Section 717(a) of the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. § 2000e-2, provides as follows:

> "All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in Section 102 of Title 5, United States Code, in executive agencies (other than the General Accounting Office) as defined in Section 105 of Title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin."

Questions Presented

1. Whether the District Court erred in holding that in passing the Equal Employment Opportunity Act of 1972, which generally prohibited discrimination in employment in the Federal Government, Congress had impliedly repealed a statute passed nearly forty years earlier which specifically gave preference to qualified Indians in employment in the Bureau of Indian Affairs, together with earlier Indian Preference Statutes.

2. Whether the Indian Preference Statutes, 25 U.S.C. §§ 44, 45, 46 and 472, which were designed to improve the

operation of the Bureau of Indian Affairs and to permit Indians to govern their own affairs, violate the Fifth Amendment of the United States Constitution.

Statement of the Case

Before describing the proceeding below, we believe that it would be helpful to outline the history and nature of Indian Preference.

1. *Indian Preference*

On three separate occasions between 1834 and 1894 Congress expressed its clear intention to encourage the employment of Indians by the Government agency charged with the conduct of Indian affairs. The statutes concerned, 25 U.S.C. §§ 44, 45, and 46, are set forth above. However, as the legislative history of the 1934 statute, 25 U.S.C. § 472, makes clear, the Bureau of Indian Affairs had failed to put these Congressional directives into effect; so that by 1934 the Bureau actually employed proportionately fewer Indians than in 1900.* Thus Senator Norbeck stated during the hearings on the bill that became the Indian Reorganization Act of 1934:

> "I think we have utterly fallen down in the present system. The Indian has been excluded. The reservation has been filled up with white people who live off the Indians." *Hearings on S. 2755 and S. 3645 before the Senate Committee on Indian Affairs,* 73rd Cong., 2d Sess., pt. 2, at 259 (1934).

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* Memorandum on S. 2755 submitted to the Senate Committee on Indian Affairs by John Collier, Commissioner for Indian Affairs, reprinted in *Hearings on S. 2755 and S. 3645 before Senate Committee on Indian Affairs,* 73rd Cong., 2d Sess., pt. 1, at 19 (1934).

Congress accordingly passed Section 472 of the 1934 Act, which provides that ". . . qualified Indians shall hereafter have the preference to appointment to vacancies" in the "Indian Office."* The main purposes of Section 472, as appears from the extensive legislative history, were to improve the function of the Indian Office, which Congress believed had lamentably failed in its duties, and to provide the Indians with a degree of self-government. As the United States Court of Appeals for the Tenth Circuit recently stated:

> "[Section 472] was intended to integrate the Indian into the government service connected with the administration of his affairs. Congress was anxious to promote economic and political self-determination for the Indian. Specific concern was directed to reforming the B.I.A., which exercised vast power over Indian lives but was staffed largely by non-Indians. Through the preference given to Indians by § 472, it was hoped that the B.I.A. would gradually become an Indian Service predominantly in the hands of educated and competent Indians." *Mescalero Apache Tribe* v. *Hickel*, 432 F.2d 956, 960 (10th Cir. 1970), *cert. denied*, 401 U.S. 981 (1971).**

For thirty-eight years after passage of the 1934 Act, the Bureau construed the term "appointment to vacancies" to mean only initial hirings from outside the Bureau. Thus, Indian Preference applied only where qualified Indian and

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* The functions of the Indian Office are now performed by the Bureau of Indian Affairs, which is part of the United States Department of the Interior, and the Indian Health Service, which is part of the United States Department of Health, Education, and Welfare. The Indian Health Service regards itself as subject to the Indian Preference Statutes.

** That case held that the Indian Preference Statutes do not apply to reductions in force.

non-Indian applicants were competing from outside the Bureau for a position in the Bureau. Indian Preference was not applied to promotions or reassignments within the Bureau. Indian employees of the Bureau consequently made little headway. As the Court of Appeals stated in *Mescalero*:

> "As the non-Indian employees retired or moved on to other jobs, competent Indians were expected to have taken their place. Unfortunately, this has apparently not happened, especially in the policy-making positions." *Mescalero Apache Tribe* v. *Hickel, supra,* 432 F.2d at 960.

Testimony in this case indicated in May, 1972, 57 percent of the 16,500 employees of the Bureau were Indian. However, 76 percent of the employees at GS-7 and below were Indian, and only 21 percent of the employees at GS-9 and above were Indian.*

On June 23, 1972, Defendant Morton, the Secretary of the Interior, announced that the Bureau was planning to implement a new Preference Policy, under which Indian Preference would be extended to reinstatement, promotion and training. However, subsequent policy statements released by the Bureau indicated that Indian Preference would not extend to training, or to lateral transfers and reassignments where no grade advances or salary increases were involved,** and that exceptions to Indian Preference would be granted under certain circumstances.

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* Testimony of Raymond Gunter, Transcript of Final Hearing on the Merits, November 29, 1972 (hereafter "Tr."), at 85-86.

** A lateral transfer is a job movement between different offices within the Bureau; a reassignment is a job movement within the same office.

2. *The Freeman Case*

Before the new Preference Policy was announced, four Indian employees of the Bureau brought suit in the United States District Court for the District of Columbia against the Secretary of the Interior and certain officials of the Bureau challenging the narrow interpretation of the Indian Preference Statutes then in operation, and alleging that Indian Preference should be extended to the areas of promotion, reassignment and training. Following the announcement of the new policy in June, 1972, the Government moved to dismiss the case on grounds of mootness, arguing that the new policy interpreted the statutes in the manner sought by the plaintiffs. The plaintiffs, however, resisted this motion, arguing that the statutes applied to all job movements, including lateral transfers and reassignments not involving promotion, and that they did not permit exceptions to be made. On December 21, 1972, the District Court (Corcoran J.) granted summary judgment in favor of plaintiffs (except on the training issue, as to which he held for the defendants), and held that 25 U.S.C. § 472 required that Indian Preference apply to "all initial hirings, promotions, lateral transfers and reassignments" in the Bureau, and that no exceptions could be granted. *Enola Freeman, et al.* v. *Rogers C. B. Morton, et al.*, Civ. No. 327-71.* A copy of the opinion is attached to this Statement as Appendix D.

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* The Government has appealed the decision to the extent that it applies Indian Preference to lateral transfers and that it denies authority to grant exceptions. Briefs have been filed by both sides with the United States Court of Appeals for the District of Columbia Circuit.

Although the constitutionality of the Indian Preference Statutes was not at issue in *Freeman*, the Court noted in *dictum* that not all classifications based on race are invalid. It also commented that the Indian Preference Statutes appeared to be a rational exercise of Congress' broad powers to "... do all that [is] required ... to prepare the Indians to take their place as independent, qualified members of the modern body politic," citing *Board of County Commissioners* v. *Seber*, 318 U.S. 705 (1943) (App. D, p. 41, n. 3).

3. *The Proceeding Below*

Following the announcement in June, 1972 of the new Indian Preference Policy, plaintiffs, four non-Indian employees of the Bureau in Albuquerque, New Mexico, brought this action seeking to enjoin defendants from enforcing the new policy. Plaintiffs attacked the Indian Preference Statutes on two grounds: first, that they deprived plaintiffs of their right to property without due process of law, thereby contravening the Fifth Amendment of the United States Constitution; and second, that they were in direct conflict with the rights of non-Indian employees of the Bureau protected under the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-2.

Upon motion of plaintiffs, a three-judge panel of the District Court was convened to hear the case, since plaintiffs sought to enjoin the enforcement of federal statutes, in part upon the ground that they were repugnant to the United States Constitution. The District Court held that the action could proceed as a class action.

On June 1, 1973, following a hearing on the merits, the District Court entered judgment in favor of plaintiffs. It

held that the Indian Preference Statutes had been impliedly repealed by the Equal Employment Opportunity Act of 1972, which provides that personnel actions affecting employees or applicants for employment in federal agencies "shall be made free from any discrimination based on race, color, religion, sex, or national origin." The Court stated that although it was reluctant to hold that Congress had overridden by subsequent legislation long-existing statutes without specific reference to them, it had concluded that Congress had done so in this instance. Moreover, the fact that the 1972 Act applied to virtually the entire Federal Government, while the Indian Preference Statutes affected only the Bureau (and the Indian Health Service), was not "a sufficient difference in the scope to bring into consideration the doctrine relating to conflicts between special and general statutes." (App. B, p. 34). The Court further stated that no evidence had been introduced to show that being Indian was a job-related criterion, or that there was any national public purpose concerned in the Preference Policy as compared with the nondiscrimination statutes. (*Id.*) The Court did not refer to the extensive legislative history of the 1934 Preference Statute which defendants introduced to demonstrate the purpose of the statute.

The Court did not reach the question of the constitutionality of the Indian Preference Statutes. However, it stated that in the absence of evidence to indicate that an important governmental objective lay behind the statutes, "we could well hold that the statute must fail on constitutional grounds." (App. B, p. 35). Again, no mention was made of the extensive legislative history of the 1934 Act introduced by defendants.

The Government and Amerind both filed Notices of Appeal with this Court on June 29, 1973. On August 16, 1973, upon application by the Government, the Court (Marshall, J.), stayed the enforcement of the District Court's judgment pending disposition of the appeal.

The Questions Are Substantial

The outcome of this case is of extreme importance to the Indian people. It directly affects more than 8,000 Indian employees of the Bureau and nearly 4,000 Indian employees of the Indian Health Service. Indirectly it will determine the extent to which the many thousands of Indians living on reservations are to be permitted to govern their own affairs. Moreover, the rationale of the District Court, if upheld, may well invalidate statutes authorizing other benefits, such as financial assistance, designed to alleviate the plight of the Indians. The entire federal Indian program could be seriously set back unless the decision below is reversed.

It is ironic, to say the least, that the lower court's decision in this case, which has invalidated an important tool that can help the Indian people towards the Congressional goal of self-determination, should come at the time when the Federal Government has finally recognized its failure of responsibility to its wards.* In a recent message to Congress, President Nixon stated:

> "It is long past time that the Indian policies of the Federal government began to recognize and build upon the capacities and insights of the Indian people.

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* Indeed, this lawsuit came about as a direct result of the broader reading of the Indian Preference Statutes by the Bureau that followed this recognition.

> Both as a matter of justice and as a matter of enlightened social policy, we must begin to act on the basis of what the Indians themselves have long been telling us. *The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions.*" (116 Cong. Rec. 23137, July 8, 1970, emphasis supplied.)

1. *In Passing the Equal Employment Opportunity Act of 1972, Congress Did Not Intend to Repeal the Indian Preference Statutes.*

The purpose of the 1934 Indian Preference Statute was described by Senator Wheeler, one of the sponsors of the bill, as being "to impose upon the Indians self government in their own affairs," and "to give the Indians the control of their own affairs and of their own property" (78 Cong. Rec. 11123, 11125 (73rd Cong., 2d Sess. 1934)). This and other legislative history of the Act makes clear that Congress, recognizing the unique status of the Bureau as the only federal agency whose purpose is to govern the affairs of one specific race of people, decided that it was only just to allow those people a say in their own government. Moreover, Congress wished to correct the situation in which "the Indian Bureau has been incompetent, oppressive, and too indifferent to the needs of the Indians." (Senator King, *Id.*, 11126). The earlier preference statutes having failed, Congress wanted to ensure that the Indian should be given "the mere privilege of getting a chance to do his own work in the employ of the Government," and to facilitate turnover of "the Indian Service to the Indians." *

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* Testimony of John Collier, Commissioner for Indian Affairs, Hearings on H. R. 7902 before House Committee on Indian Affairs, 73rd Cong., 2d Sess., Pt. 1 at 38, 58 (1934).

(a) The Legislative History of the Civil Rights Acts Indicates That Congress Intended the Indian Preference Statutes to Remain in Force.

There is not one word in the legislative history of the 1972 Equal Employment Opportunity Act which suggests that Congress intended to repeal the Indian Preference Statutes. Moreover, the overall legislative history of this Act and of the Civil Rights Act of 1964 strongly suggests that in fact Congress intended these statutes to remain in force. The 1964 Act, *inter alia*, prohibited discrimination by private employers on grounds of race, color, religion, sex, or national origin. However, Section 703(i), 42 U.S.C. § 2000e-2(i) provides that the prohibition is not to apply

> "to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation."

Senator Humphrey, who sponsored Section 703(i), explained that:

> "This exemption is consistent with the *Federal Government's policy of encouraging Indian employment* and with the special legal position of Indians." (110 Cong. Rec. 12721, June 4, 1964, emphasis supplied.)

In other words, Congress, recognizing the existing preference given to federally-employed Indians in the Bureau, wished to ensure that similar preference on the part of private employers would not be banned by the 1964 Act. It is inconceivable that in extending the general prohibition against discrimination in employment to the Federal Gov-

ernment in 1972, Congress could have intended to sweep away Indian Preference, when eight years earlier it had specifically recognized this policy and ensured that private employers would not be forbidden to give preference to Indians. To the contrary, it is far more likely that Congress intended the 1934 Statute to remain in effect as the counterpart to the 1964 provision.

The focus of the 1972 Equal Employment Opportunity Act itself suggests that Congress did not intend to repeal the Indian Preference Statutes. Not only is the 1972 Act a statute of general application, as opposed to the very specific Indian Preference Statutes (see below, Subsection (b)), but it appears that the prohibition on discrimination in employment imposed by the 1972 Act was only intended to cover positions in the competitive part of the Civil Service. Section 717(a), 42 U.S.C. § 2000e-2 covers not only federal military departments and executive agencies, but also "those units of the Government of the District of Columbia *having positions in the competitive service,* and . . . those units of the legislative and judicial branches of the Federal Government *having positions in the competitive service.*" (Emphasis added.) This language itself suggests that Congress had in mind only Competitive Service positions in the federal agencies as well, and the House Report on the bill confirms that this indeed was Congress' intent. In its section-by-section analysis of the bill it stated with reference to Section 717(a):

> "All personnel actions affecting employees or applicants for employment *in the competitive service of the United States* . . . shall be made free from any discrimination based on race, color, religion, sex or national origin."*

* House Report 92-238, 92d Cong., 2d Sess. (1972), 1972 U.S. Code Congressional and Administrative News, Vol. 2, 2137, 2167.

But the Bureau is staffed substantially from outside the Competitive Service. The first sentence of the 1934 Statute, 25 U.S.C. § 472, authorized the appointment of Indians to the Indian Office "without regard to civil-service laws," and thus gave rise to the so-called "Excepted Service," whereby Indians are appointed to the Bureau outside the normal competitive civil service procedures. It is believed that most Indians join the Bureau through the Excepted Service, and although some transfer to the Competitive Service after entering the Bureau, at least half of the Indian employees now in the Bureau are in the Excepted Service.* It is quite unreasonable, therefore, to assume that Congress intended the 1972 Act to apply to the Bureau.

(b) In the Absence of Legislative History to the Contrary, General Legislation Does Not Repeal Earlier Specific Legislation.

Even if we ignore the legislative history of the Civil Rights Acts described above, it is clear that the District Court erred in holding that the Indian Preference Statutes were impliedly repealed by the 1972 Act. As we have noted, in passing the 1972 Equal Employment Opportunity Act Congress said not one word about intending to repeal the Indian Preference Statutes, and in these circumstances, "a specific statute controls over a general one 'without regard to priority of enactment.'" *Bulova Watch Co.* v. *United States*, 365 U.S. 753, 758 (1961). We cannot understand the District Court's conclusion that this case does not involve a conflict between special and general legislation. The 1972 Act covers virtually the entire Federal Government; the Indian Preference Statutes affect only a few thousand employees in two agencies. Moreover, the Bureau occupies a

* Testimony of Raymond Gunter, Tr. 90-91.

unique position in the Federal Government. As Senator Wheeler, one of the sponsors of the 1934 Indian Preference Statute, stated during the hearings on the bill, "it is an entirely different service from anything else in the United States, because these Indians own [their own] property."* As discussed in Section 2 below, the Indian occupies a unique position in the constitutional and legal structure of the United States.

This Court has previously held that general legislation did not override earlier legislation specifically applicable to Indians. The question in *Squire* v. *Capoeman*, 351 U.S. 1 (1956), was whether the sale of timber on land allotted to Indians under the General Allotment Act of 1887 was subject to taxation under the Internal Revenue Code of 1939. The Government argued that the Code contained no exemption for tax in this situation. The Court concluded, however, that in passing the General Allotment Act and an amendment thereto, Congress had exempted such sales tax, and that:

> "It is unreasonable to infer that, in enacting the income tax law, Congress intended to undermine the Government's undertaking. To tax respondent under these circumstances would . . . be 'at the least, a sorry breach of faith with these Indians.'" 351 U.S. at 10.

We submit that in the absence of a shred of evidence that Congress in 1972 intended to repeal the Indian Preference Statutes, it would be an equally sorry breach of faith with the Indian people to hold that these statutes had been impliedly overruled by the Equal Employment Opportunity Act.

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* Hearings on S. 2755 and S. 3645 before Senate Committee on Indian Affairs, 73rd Cong., 2d Sess. (1934) at 256.

2. *The Unique Legal Status of the Indian, and the Strong Government Purpose Underlying the Indian Preference Statutes, Override Any Possible Constitutional Objections.*

As we have noted, the District Court did not reach the constitutional question raised by plaintiffs, although it intimated that in the absence of evidence as to an important governmental objective it might have held that the statute must fail on constitutional grounds (App. B, p. 35). In the event that this Court agrees with our contention that the Indian Preference Statutes have not been repealed by Congress, the constitutional question will be squarely raised. The Court may wish to consider the question on this appeal. As we now show, we believe that despite the District Court's conclusion, there was sufficient material in the record below to demonstrate that in passing the Indian Preference Statutes Congress had a valid and important purpose which overrides any possible constitutional objections.

As Senator Wheeler, one of the sponsors of the 1934 Act, noted, the Bureau "is an entirely different service from anything else in the United States, because these Indians own their own property." * The essential purpose of the statute, as clearly appears from the legislative history (which was before the District Court), was gradually to turn over the operation of the Bureau, which governs the affairs of Indians, to the governed. Congress was concerned that:

> "The civil service as applied to the Indians has built up an inefficient and incompetent bureaucracy, under

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* Hearings on S. 2755 and S. 3645 before Senate Committee on Indian Affairs, 73rd Cong. 2d Sess. (1934), at 256.

> which the progress of the Indians has been interfered with and the individual, economic, and moral development has been impeded." *

The preference applied only to the "Indian Office," which now consists of the Bureau of Indian Affairs and the Indian Health Service. The preference does not even apply to all Indians, since members of tribes who have severed their relationship with the Federal Government do not receive the preference.** The Bureau's work deals "predominantly" with reservation Indians, who own the land on which they live.*** Congress believed that it was only just, after many years of mismanagement and abuse of the Indian people, that the Indian should be given an opportunity to manage his own affairs. This, we submit, is an overwhelming governmental purpose which overrides any possible constitutional objection.

It has long been recognized that the Indian occupies a unique position in the constitutional and legal framework off this country. An entire chapter of the United States Code is devoted to laws which apply exclusively to Indians.†

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* Senator King, 78 Cong. Sec. 11127 (73rd Cong. 2d Sess. (1934)).

** Testimony of Raymond Gunter, Tr. 99.

*** *Id.*, 93. In effect, therefore, the preference is not so much based upon race, but upon land ownership. We do not believe that the Constitution would bar a municipal ordinance giving preference in employment in municipal government to residents of the municipality.

† This legislation covers, among other matters, education (25 U.S.C. § 13), health (25 U.S.C. § 231), civil liberties (25 U.S.C. §§ 1301-03), welfare (25 U.S.C. §§ 305-09(a)), transfers of land (25 U.S.C. §§ 348, 391, 393), validity of contracts (25 U.S.C. §§ 81, 82(a), 84), testamentary disposition (25 U.S.C. §§ 371-80), and expenditures of tribal funds (25 U.S.C. § 122).

"[T]he relation of the Indians to United States is marked by peculiar and cardinal distinctions which exist nowhere else. . . ." *The Cherokee Nation* v. *Georgia*, 5 Pet. 1, 16. *See also United States* v. *Kagama*, 118 U.S. 375, 381 (1886); *Scott* v. *Sanford*, 60 U.S. 393, 403-04 (1856).

In recognition of this unique status, the courts have held that Indians may be accorded special preferential treatment consistently with the United States Constitution. In 1943 the Supreme Court upheld the constitutionality of federal statutes which exempted from Oklahoma Real Estate taxes certain lands held by Indians. *Board of County Commissioners* v. *Seber*, 318 U.S. 704 (1943). And in 1965, the Supreme Court affirmed a decision of a three-judge district court upholding the constitutionality of a statute restricting inheritance of certain property to enrolled members of Yakima tribes of one-fourth blood or more. *Simmons* v. *Eagle Seelatsee*, 244 F. Supp. 808 (E.D. Wash. 1965), *aff'd*, p.c. 384 U.S. 209 (1966). The lower court in *Simmons* stated:

> ". . . it seems obvious that whenever Congress deals with Indians . . . it must necessarily do so by reference to Indian blood . . .
>
> "Indeed, if legislation is to deal with Indians at all, the very reference to them implies the use of a 'criterion of race.' *Indians can only be defined by their race.*
>
> ". . . Congress in legislation has not hesitated to place full-blood Indians in one class and all others in another, giving one class more rights than the other." (244 F. Supp. at 814-15, emphasis supplied.)

• • • • •

CONCLUSION

The Court below, we submit, erred on an issue of great public importance. Its decision, if affirmed, will block implementation of a policy laid down by Congress on four different occasions, beginning in 1834, and designed to allow the Indian a measure of self-determination. We request that this Court note probable jurisdiction, so that it may give plenary consideration to the important questions raised by this case.

Respectfully submitted,

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Dated: January 29, 1974.

APPENDIX A

Order of District Court Dated November 20, 1972, Granting Motion of Amerind to Intervene as Defendant

IN THE

UNITED STATES DISTRICT COURT

DISTRICT OF NEW MEXICO

No: 9626 Civil

MANCARI *et al.*,

Plaintiffs,

—v.—

ROGER C. B. MORTON, as Secretary of the Interior, *et al.*,

Defendants,

AMERIND,

Applicant for Intervention.

THIS MATTER coming on to be heard on this 20th day of November, 1972, upon the Motion of the Applicant for Intervention requesting that Amerind be permitted to intervene as a party in this action, the Court having considered this Motion and being fully advised in the premises,

IT IS ORDERED:

That Amerind be permitted to intervene as a party in this case.

Done in Open Court this 20th day of November, 1972 this Order is entered upon the oral concurrence of all Members of the Court.

By the Court:

/s/ Howard Bratton
Judge

APPENDIX B

The Opinion and Judgment of District Court, June 1, 1973

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

No. 9626 Civil.

C. R. MANCARI, ANTHONY FRANCO, WILBERT GARRETT and JULES COOPER, on behalf of themselves and all others similarly situated, PLAINTIFFS

v.

ROGERS C. B. MORTON, as Secretary of the Interior, *et al.*, DEFENDANTS

MEMORANDUM OPINION

Filed at Albuquerque, June 1, 1973

This is a class action brought by the named plaintiffs on behalf of themselves and all other employees of the Bureau of Indian Affairs who are of less than twenty-five per cent Indian blood. Plaintiffs seek to enjoin the defendants from implementing and enforcing a policy of the Bureau of Indian Affairs to give preference to persons of one-quarter or more Indian blood in initial hiring, training, promotion, and reinstatement.

Plaintiffs allege that Title 25, United States Code, §§ 44-46 and 472 (hereinafter the Indian Preference Statutes), are being improperly construed by the Secretary and the Commissioner in that these sections were meant to extend a preference to Indians in initial hiring only. Plaintiffs further allege that this expanded policy violates their rights under the Civil Rights Acts of 1964 and 1972, which rights are

guaranteed them in Title 42, United States Code, §§ 2000e et seq., and Public Law 92-261, § 717. Finally plaintiffs allege that the Indian Preference Statutes are unconstitutional because they deprive plaintiffs of their rights to property without due process of law in violation of the Fifth Amendment to the United States Constitution.

The non-Indian plaintiffs are longtime employees of the BIA. They are teachers at the Albuquerque Polytechnic Institute, or programmers, or in computer work, or teachers in other areas. They testified as to particular training or advancements for which they had applied, and which in their opinion were denied by reason of the application of the preference policy. We find that the plaintiffs demonstrated sufficient connection with the application of the policy to bring this action for themselves and others similarly situated.

The defendants are persons occupying official positions relating to the BIA and are responsible for the application of the Acts herein concerned.

We find that there are asserted substantial constitutional questions requiring consideration by a three-judge court

The United States Attorney, who appears for the defendants, challenges the court's jurisdiction over the subject matter. The Court of Appeals in Mescalero Apache Tribe v. Hickel, 432 F.2d 956 (10th Cir.), held that there was jurisdiction under 5 U.S.C. § 704 in that action. Here the plaintiffs assert jurisdiction under 42 U.S.C. § 2000e and 28 U.S.C. § 1346(a)(2). This could be considered under the latter statute since the action was against "Rogers C. B. Morton, as Secretary of the Interior," and against other named persons in their official capacities. As indicated, the United States Attorney has

appeared as counsel for the defendants. However, we hold that there is jurisdiction under 42 U.S.C. § 2000 e, and any further challenge before the Department concerned would be an idle gesture in the face of the issuance of the policy statement and its implementation by regulations and orders. The issue is not an interpretation of policy statements or their application, but is a direct challenge to the validity of the statute on which the departmental policy is based. There is thus no purpose shown why any further administrative action would serve any useful purpose. Mescalero Apache Tribe v. Hickel, 432 F.2d 956 (10th Cir.), we believe, is significant on this point although it dealt with 5 U.S.C. § 704 where no administrative machinery was expressly provided.

Defendants contend that they are directed by 25 U.S.C. § 472 to implement the policy of Indian preference. Section 472 provides as follows:

> "The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions."

Other statutory provisions relating to preference, although less explicit, appear at 25 U.S.C. §§ 44 and 46.

The gist of the preference policy which precipitated the challenge was embodied in Personnel Management Letter No. 72-12, issued by the Albuquerque Area Office of the BIA, which provided in part as follows:

"The Secretary of the Interior announced today he has approved the Bureau's policy to extend Indian preference to training and filling vacancies by original appointment, reinstatement and promotions. . . .

"The new policy provides as follows: Where two or more candidates who meet the established requirements are available for filling a vacancy, if one of them is an Indian, he shall be given preference in filling the vacancy. This policy is effective immediately, and is incorporated into all existing programs such as the Promotion Program. . . ."

The policy was officially announced and, as we find from the evidence that it is being carried out, applies the preference in hiring and promotions. Instances of promotional preferences were testified to by the witnesses. The policy is thus a reality, and far beyond the formative stage.

A preliminary issue relates to the validity of 25 U.S.C. § 472, quoted above, in view of its inclusion in the heterogeneous Indian Reorganization Act of 1934. This provision was included in the Reorganization Act together with other sections which relate to a variety of subjects. In one of the sections, now 25 U.S.C. § 478, provision is made for submission of "the Act" for acceptance or rejection by the various Indian tribes. This voting section (478) on its face would appear to make the application of section 472, with which we are here concerned, optional with individual tribes by requiring a special election of the adult members of the tribe to vote on the application of the entire Act.

The Reorganization Act was submitted and voted on and was rejected by a considerable number of

tribes. This rejection and acceptance tribe by tribe creates some uncertainty, but a careful reading of the other sections, as well as a review of the Congressional history of the Act, convinces us that the elections were to be only for the purpose of accepting or rejecting sections 476 and 477 of Title 25, 48 Stat. 987-88. For example, we cannot believe that Congress intended all the Indian tribes to vote on the extension of boundaries of the Papago Reservation (section 463a, 50 Stat. 536), on the Secretary making rules and regulations for the operation and management of Indian forestry units (section 466, 48 Stat. 986), or on appropriations for vocational and trade schools (section 471, 48 Stat. 985), or on other provisions found in the Indian Reorganization Act. It is difficult to see how under any other construction the Act would be valid.

Senator Wheeler, one of the sponsors of the Reorganization Act, made the following remarks in his discussion of sections 476 and 477 of the Act:

> "The third purpose of the bill is to stabilize the tribal organization of Indian tribes by vesting such tribal organizations with real, though limited, authority, and by prescribing conditions which must be met by such tribal organizations. This provision will apply only if a majority of the Indians on any Indian reservation desire this sort of organization. As a matter of fact, however, it does not change to any great extent the present tribal organization, except that when a majority of the Indians want to establish this tribal organization and extend the provisions of the bill to it, they may do so." (1934 Congressional Record, p. 11123).

Nothing which followed in the debate or in the way of amendments suggests to us that the option of acceptance was extended to any other portion of the Act, and therefore the preference section here concerned must be held to extend to all Indians as individuals.

The issue of the proper construction of 25 U.S.C. § 472 is urged on this appeal and is a significant problem. The United States Court of Appeals for the Tenth Circuit in Mescalero Apache Tribe v. Hickel, 432 F.2d 956, considered the application of the preference statutes to reductions in the work force of the Bureau of Indian Affairs, and held the preference not applicable. There section 472 was considered, as were sections 44 and 46 of 25 U.S.C., and references were made to the legislative history. The parties and the court were there concerned only with the particular issue at hand. There was no other issue nor a general challenge to the Act. The preference thus does not apply to reductions in the work force.

The United States District Court for the District of Columbia, in Freeman v. Morton, Civ. No. 327-71 (not yet reported), had before it the question of whether or not section 472 gave the plaintiff a preference over all non-Indian employees in the Bureau of Indian Affairs with respect to promotions, reassignments to vacant positions within the BIA, and to assignments to available training positions (the contrary position was that the preference was only as to initial hiring). The district court in Freeman held that section 472 required the preference be given in promotions and reassignments to vacant positions within the Bureau, but that it did not extend to positions in training programs.

We do not decide whether the preference is as broad as the court in Freeman v. Morton indicates. It is sufficient to permit consideration of the basic issue to observe that no one challenges the application of the preference acts to initial hiring and indeed the wording does not permit such a challenge.

We turn now to the asserted conflict between the Indian Preference statute and the Civil Rights Acts of 1964 and 1972 (Equal Employment Opportunity Act, 1972, Public Law 92-261). As indicated above plaintiffs assert that the Indian Preference Policy adopted and implemented by the Bureau is in direct conflict with the Civil Rights Act of 1964 and 1972, and more specifically with Title 42, United States Code, § 2000e-2 and as amended by Public Law 92-261. Plaintiffs in their challenge to the preference acts thus assert that the Bureau, by refusing to obey the Congressional mandate set forth in section 717 of Public Law 92-261, is violating the rights given them under that added section.

Section 717 provides in part as follows:

> "Sec. 717. (a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code, in executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units

> of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin."

On its face, section 717 applies to all agencies of the federal government. There is nothing in the Committee Report or in House Report No. 92-238, accompanying H. R. 1746, enacted into law as Public Law 92-261, which would indicate that the Bureau of Indian Affairs be excepted from its provisions (see 1972 U.S. Code Cong. & Ad. News, pp. 2137, 2157). Exceptions are contained in the Act, but none as to the Indians or the Bureau.

Senator Byrd of West Virginia, speaking in favor of the bill, made the following remarks:

> "I do not favor special treatment or special consideration or favored employment of any individual on the basis of that person's being black or white, male or female. . . Notwithstanding what I have just said, the fact remains that discrimination in employment, on the basis of race, does exist, and discrimination against sex does persist. Wherever there is such discrimination in employment, it is violative of the Constitution of the United States. . . .
>
> "In other words, he should rise or fall on the basis of merit, not on the basis of race or religion or sex. Every qualified individual—black, white or else—should be given an equal chance—not preferential treatment—at employment." (Congressional Record, January 26, 1972, at s. 590).

And Senator Humphrey, speaking for the bill, made the following statement:

> "We must make absolutely clear the obligation of the Federal Government to make all personnel actions free from discrimination based on race, color, sex, religion, or national origin." (Congressional Record, January 20, 1972, at ss. 172-173).

The United States Supreme Court, in Griggs v. Duke Power Co., 401 U.S. 424, at 430-31, held as to Title VII:

> "Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."

The Eighth Circuit has also held that Title VII forbids reverse discrimination. Carter v. Gallagher, 452 F.2d 315 (8th Cir.). See also Jackson v. Poston, No. 18296, New York Sup. Ct.

Should section 717 of Public Law 92-261 take precedence over the Indian Preference Statutes? Although we are reluctant to hold that Congress has overridden by subsequent legislation long existing statutes without specific reference to them, we must conclude that this was done in this instance.

The Equal Employment Opportunity Act of 1972 is a clear, emphatic directive by Congress that all positions in the competitive civil service of the federal government should be filled without regard to race, religion, sex, color, or national origin. It is subject to no other interpretation, and as indicated, there were exceptions placed in it, so Congress considered limitations on its scope, but none was included as to the Bureau of Indian Affairs. Thus the several preference statutes were overridden, and the Bureau must conform to the broad sweep of section 717.

This is not a simple instance of a relationship of a general statute to a special subject statute which often occurs. Each statute purports to cover the same particular subject of personnel actions relating to, as section 717 described them, ". . . discrimination based on race, color, religion, sex, or national origin." One Act applies to all but some excepted bureaus or agencies and the other to the "Indian Office." This is not a sufficient difference in the scope to bring into consideration the doctrine relating to conflicts between special and general statutes. Further by the nature of the subject matter and scope, the two cannot exist side by side. See Posadas v. National City Bank, 296 U.S. 497.

There was no evidence introduced to show in any way that having seventy-five per cent non-Indian blood and twenty-five per cent Indian blood was in any way a job-related criterion. Griggs v. Duke Power Co., 401 U.S. 424. There was no evidence whatever presented to show any national-public purpose concerned in the preference policy as compared with the nondiscrimination statutes. There would certainly have to be some showing of these factors before defendants' arguments could be considered to support the preference statutes as an exception.

We do not consider that Board of County Comm'rs v. Seber, 318 U.S. 705, or Simmons v. Eagle Seelatsee, 384 U.S. 209, led to a contrary conclusion. It is apparent that Indian tribes have been the subject of particular legislation from time to time. But this of itself is no reason for a different treatment of Indians generally. Indians as such are not considered to have rights, so far as here pertinent, different from other citizens; they are citizens and are obviously entitled to all rights, privileges, and burdens thereof.

We have not considered the challenge by plaintiffs to the constitutionality of the preference statutes. This issue involves the consideration of the reasonable governmental purpose or objective sought to be attained in creating the preferred position for certain persons having a stated percentage of Indian blood as compared to others. There was testimony as to the manner in which certain non-Indians were affected by the policy. The separate treatment was thereby established together with its impact on the individuals. The defendants had the burden of coming forward with evidence of an important governmental objective but put on no evidence directed to this matter. Under these circumstances, we could well hold that the statute must fail on constitutional grounds, but instead we hold as above described that the preference statutes must give way to the Civil Rights Acts.

/s/ Oliver Seth
United States Circuit Judge

/s/ Howard Bratton
United States District Judge

/s/ E. L. Mechem
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 9626 Civil

C. R. MANCARI, *et al.*, PLAINTIFFS

v.

ROGERS C. B. MORTON,
Secretary of the Interior, *et al.*

[Filed at Albuquerque, Jun. 1, 1973]

JUDGMENT

IT IS ORDERED, ADJUDGED AND DECREED that the named defendants are hereby permanently enjoined from implementing any policy in the Bureau of Indian Affairs which would hire, promote, or reassign any person in preference to another solely for the reason that such person is an Indian, since 25 U.S.C. §§ 44, 46 and 472 are contrary to the Civil Rights Act, and are inoperative.

IT IS SO ORDERED.

/s/ Oliver Seth
United States Circuit Judge

/s/ Howard Bratton
United States District Judge

/s/ E. L. Meechem
United States District Judge

APPENDIX C

Notices of Appeal by Amerind and the Government

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

No. 9626 Civil

C. R. MANCARI, ANTHONY FRANCO, WILBERT GARRETT and JULES COOPER, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

—v.—

ROGERS C. B. MORTON, as Secretary of the Interior, LOUIS R. BRUCE, as Commissioner of Indian Affairs, WALTER O. OLSON, as Area Director, Bureau of Indian Affairs, Albuquerque Area Office, and ANTHONY LINCOLN, as Area Director, Bureau of Indian Affairs, Navajo Area Office,

Defendants-Appellants,

—v.—

AMERIND,

Intervenor-Appellant.

Pursuant to Rules 10 and 11, Supreme Court of the United States, the above-named Appellant, Amerind, hereby

appeals to the United States Supreme Court from the final order of the United States District Court for the District of New Mexico, granting Appellees' Complaint for injunctive relief, entered in this action on June 1, 1973.

This notice of appeal, filed this 29th day of June, 1973, is taken pursuant to 28 U.S.C. § 1253.

Respectfully submitted,

HARRIS D. SHERMAN
Attorney for Intervenor-Appellant Amerind
1130 Capitol Life Center
Denver, Colorado 80203, (303) 892-6022

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

No. 9626 Civil

C. R. MANCARI, *et al.*,

Plaintiffs,

—VS.—

ROGERS C. B. MORTON,
Secretary of the Interior, *et al.*

[Original Filed Jun. 29, 1973]

NOTICE OF APPEAL

NOTICE is hereby given that the defendants Rogers C. B. Morton, as Secretary of the Interior, Louis R. Bruce, as Commissioner of Indian Affairs, Walter O. Olson, as Area Director, Bureau of Indian Affairs, Albuquerque Area Office, and Anthony Lincoln, as Area Director, Bureau of Indian Affairs, Navajo Area Office, hereby appeal to the Supreme Court of the United States from the final judgment entered in this action on June 1, 1973. This appeal is taken pursuant to the provisions of 28 U.S.C., Section 1253.

/s/ Victor R. Ortega
VICTOR R. ORTEGA
United States Attorney
Post Office Box 607
Albuquerque, New Mexico 87102
Attorney for Defendants

APPENDIX D

Opinion of the District Court for the District of Columbia in *Enola Freeman, et al.* v. *Rogers C. B. Morton, et al.*, Civ. No. 327-71 (December 21, 1971)

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 327-71

ENOLA E. FREEMAN on behalf of herself, and all others similarly situated, *et al.*,

Plaintiffs,

—v.—

ROGERS C. B. MORTON, Secretary of the Interior, *et al.*,

Defendants.

OPINION AND ORDER

The plaintiff, a person of at least one quarter Indian blood,[1] suing on her own behalf and on behalf of all other Indian employees of the Bureau of Indian Affairs (hereinafter the "BIA"), asks for summary judgment on her request for declaratory relief against the defendant,

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[1] This satisfies the BIA's definition of a member of the Indian race. 44 Bureau of Indian Affairs Manual 713, 1.2.

Rogers Morton, Secretary of the Interior, and all others with responsibility for administering the BIA.[2]

Specifically, she asks that a portion of the Indian Reorganization Act of 1934—25 U.S.C. Sec. 472—be declared to vest the plaintiff, by virtue of her status as an Indian employee of the Bureau of Indian Affairs, with preference over all non-Indian employees in respect to:

(a) promotions,

(b) reassignments to vacant positions within the BIA; and

(c) assignments to available training programs

The defendant has made a cross-motion for summary judgment and seeks a declaration that Section 472 is mandatory only in the area of initial hiring.[3]

Section 472 reads as follows:

Standards for Indians Appointed to Indian Office

The Secretary of Interior is directed to establish standards of health, age, character, experience, knowledge and ability for Indians who may be appointed, without regard to civil service laws, to the various *positions*

[2] The government challenges the standing of the plaintiff to sue. Without belaboring the point, this Court finds that she does have the requisite standing as an Indian employee of the BIA to seek declaratory relief of the nature sought.

[3] Since neither party has raised the constitutional questions that such racially discriminatory legislation brings to mind, the Court will not treat them. Certainly not all classifications based on race are invalid. *Contractors Ass'n of Eastern Pa.* v. *Secretary of Labor*, 442 F.2d 159 (3rd Cir. 1971); and Congress has broad powers to "... do all that [is] required ... to prepare the Indians to take their place as independent, qualified members of the modern body politic." *Board of County Commissioners* v. *Seber*, 318 U.S. 705 (1943). These Indian preference statutes appear to be a rational exercise of that power.

maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian Tribe. *Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions.* (emphasis added) June 18, 1934, c. 576 Sec. 12, 48 Stat. 986.

A. Promotions

The plaintiff contends that the language italicized above is mandatory in its thrust and that a preference must be accorded all Indians whenever a vacancy is to be filled. She suggests that a vacancy occurs whenever and however there is an opening to be filled within the BIA, and the fact that the vacancy may be of such a nature that it should or may be filled by promotion or otherwise within the BIA is immaterial. Upon the occurence of a vacancy, the defendant must provide an opportunity for the submission of applications for it and any "qualified" Indian applicants must be given preference over non-Indian applicants. Plaintiff defines "preference" to mean that a minimally qualified Indian *must* be hired even though there may be available a more capable, better qualified non-Indian applicant for the position.

The defendant does not quarrel with plaintiff's concept or preference; but, relying upon *dicta* in *Mescalero Apache Tribe* v. *Hickel,* 432 F.2d 956 (10th Cir. 1970),[4] argues that

[4] While the Tenth Circuit decision in *Mescalero* was limited to the question of whether Indian preference should be extended to reduction in force (a question which lies beyond the scope of this discussion), there is dicta which suggests that ". . . it may be necessary to employ non-Indians whenever it is not 'practicable' to do otherwise." In light of the clear language of Sec. 472 this Court concludes that the Tenth Circuit did not intend the term "practicable" to embrace any situation other than the absence of qualified Indian applicants. In any case, the quoted language was mere dicta and not essential to the Court's holding.

the mandatory use of the preference applies only to initial hiring.

The defendant further argues that it has adopted in "99% of all promotion cases" the policy the plaintiff asserts is made mandatory by Sec. 472, but that there should be implied administrative discretion in the implementation of the preference policy so that in an emergency or other crisis the Secretary may be permitted to use other criteria in promotion decisions. In any case, he argues, this is a rational interpretation and application of the Congressional mandate and should not be disturbed. *Udall* v. *Tallman*, 380 U.S. 1 (1965).

The Court finds that the statutory language cannot be read to sustain either of the defendant's contentions. As to the assertion that "vacancy" applies only to initial hiring there is nothing either in the statute itself or its legislative history to support such a claim. A "vacancy" is a "vacancy" no matter how created. Congress drew no distinctions—as it could easily have done had it so intended.[5]

And, as to the assertion that there must be administrative discretion in the implementation of the preference

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[5] One need only look at various Indian preference statutes to recognize that Congress was well aware of the distinction between discretionary and mandatory action.

For example, Congress enacted a preference statute in 1934 giving preference to Indians for positions as interpreters "... *if such can be found.*" 25 U.S.C. Sec. 45, 4 Stat. 737. In 1882 preference was extended to clerical, mechanical or other help on the Indian reservations "... *as far as practicable.*" 25 U.S.C. Sec. 46, 22 Stat. 88. In 1884 Congress instructed the Secretary of the Interior to see that Indians were to be employed as teamsters, herders and laborers and "*where practicable* in all other employments in connection with the agencies and the Indian service." 25 U.S.C. Sec. 44, 28 Stat. 313. (emphasis supplied)

In light of this past statutory language the Court concludes that if Congress had intended to write discretionary power into the language of Sec. 472 it would have done so expressly.

policy, again we must turn to the statute. It does not say the "Indians . . . *may* have preference." It says: " . . . qualified Indians shall hereafter have . . . preference." And this Court so holds. If such a mandate makes the administrative position of the defendant difficult, it is to Congress that the defendant must turn for relief, not the courts. The mandate of the legislature cannot be construed away for the sake of convenience.

B. Reassignments and "Lateral Transfers"

This aspect of the controversy concerns those situations where a vacancy occurs somewhere in the BIA and, by pre-arrangement or otherwise, is filled "laterally" by an employee without any attendant change in that employee's status viz-a-viz the overall BIA personnel picture. For example: an employee clerk-typist grade GS-6 in Office A retires or leaves, and a second employee, GS-6 clerk-typist is laterally transferred from Office B to the vacancy in Office A created by the severed employee.

The defendant argues that the net effect of such a situation is to create only *one* vacancy. In filling that vacancy, he argues, the preference should apply, but only as to that vacancy. The plaintiff's argument suggests that two "vacancies" are created—one in Office A when the first employee resigns or retires and another in Office B when the second employee is transferred—and that the preference statute applies to both.

Again the Court must agree with the plaintiff. While it is obvious that this strict interpretation of Section 472 will leave the non-Indian employees of the BIA in a relatively frozen position and will undoubtedly dim their promotional prospects within the agency, the Court cannot

say that such a result lies outside the intent of Congress. The legislative history of the Indian Reorganization Act of 1934 reveals that the Congressional intent was that the BIA become an agency staffed with Indians performing services for Indians. While the "present employees" of the agency were not to be dismissed from their jobs because of the preference, it goes without saying that a choice was made between their future prospects and the Congressional purpose that the BIA became an "Indian" agency in the sense that it was to be staffed by Indians wherever possible. 78 Cong. Rec. 11729-31.

The Court appreciates the complexity of the problems administrative personnel may face in implementing this interpretation of Section 472, but as stated above, this difficulty, if it arises, should be resolved by the legislature not this Court.

C. Assignment to Training Programs

In this instance the plaintiff argues that since the preference required by Section 472 is limited to "qualified Indians," it is implicit that preference must also be afforded Indians in obtaining access to training programs so that they may presumably become more "qualified" to fill any vacancy that occurs.

The Court does not agree. The standards set by the statute refer only to "positions" *maintained* by the BIA. The Court finds that training programs clearly are not maintained positions within the meaning of the statutory language, and that vacancies in such programs need not necessarily be filled with reference to the Indian preference statutes.

Plaintiff's counsel argues that there is an "implication" inherent in 25 U.S.C. 472 that Congress intended that

preferential treatment be afforded Indians in the area of job-related training programs as well as in promotions and hiring.

However, the legislative history cited to support this contention is drawn from the debate and hearings concerning the entire Indian Reorganization Act of 1934 of which 25 U.S.C. 472 was but a part. In fact, Section 11 of that Act (now 25 U.S.C. 471) provided for an appropriation of $250,000 annually for Indian training and educational scholarships, and it was *this* section to which the Congressional remarks concerning the entire Indian Reorganization Act were directed, not the section providing for Indian preference in filling vacancies. 78 Cong. Rec. 11123, 11729-11731. Undoubtedly Congress intended to train Indians to fulfill the new responsibilities being made available to them; but it was through the allocation of additional funds, not the application of the preference statute that this intention was to be executed.

Since there is no evidence of Congressional intention to extend the principle of Indian preference to training opportunities within the BIA, the Court will not imply one—just as it would not imply a limitation on the definition of the word "vacancy" *supra*.[6]

It is accordingly ORDERED this 21st day of December, 1972, that all initial hirings, promotions, lateral transfers

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[6] Such an implication would fly in the face of subsequent legislation. Under the authority of the Training Act of 1958 the Civil Service Commission has promulgated certain regulations, Section 410.302(c) of which requires that each agency see that selection of employees for training be made "without regard to race, color, religion, sex, national origin . . . " While certain government agencies were exempted from the coverage of these regulations (The Foreign Service, Tennessee Valley Authority, Central Intelligence Agency), 5 U.S.C. §4102, the BIA was not.

and reassignments in the Bureau of Indian Affairs as well as any other personnel movement therein intended to fill vacancies in that agency, however created, be declared governed by 25 U.S.C. Sec. 472 which requires that preference be afforded qualified Indian candidates; and it is further

ORDERED that the plaintiff's motion for a declaration that the filling of vacancies in training programs administered by the BIA is also governed by the same preference statute be denied.

HOWARD F. CORCORAN
Judge